

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PEDRO R. VILLAMAR and DEPARTMENT OF THE INTERIOR,  
BUREAU OF LAND MANAGEMENT, North Bend, OR

*Docket No. 99-1393; Submitted on the Record;  
Issued August 2, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained a knee injury in the performance of duty and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On April 8, 1998 appellant, then a 53-year-old materials handler, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that he sustained a knee injury causally related to his federal employment. Appellant stated that his knee problem was the result of walking, kneeling and climbing metal ladders during his federal employment. Appellant stated that he first became aware of his knee injury on March 23, 1998. Appellant did not stop work.

In support of his claim, appellant submitted an injured worker status report prepared by Dr. Robert W. Gerber, a family practitioner, dated April 13, 1998. Dr. Gerber diagnosed appellant with right knee pain and a possible patellar tracking problem and noted appellant could return to light duty on April 13, 1998.

In a letter dated April 23, 1998, the Office advised appellant of the type of factual and medical evidence needed to establish his claim and requested that he submit such evidence. The Office particularly requested that appellant submit a physician's reasoned opinion addressing the relationship of his claimed condition and specific employment factors.

Appellant submitted a medical report dated April 13, 1998 prepared by Dr. Gerber; a medical report from Dr. Jon S. Davis, an orthopedic surgeon, dated April 17, 1998, three injured worker status reports dated April 21, May 8 and 22, 1998 prepared by Dr. Gerber; a magnetic resonance imaging (MRI) scan report dated April 23, 1998, a physical therapy report dated May 1, 1998 and an attending physician's report dated May 5, 1998, prepared by Dr. Davis. Dr. Gerber's medical report dated April 13, 1998 noted a diagnosis of derangement of the knee.

Dr. Davis' medical report dated April 17, 1998 diagnosed degenerative arthritis, possible Baker's cyst secondary to a meniscal tear. Dr. Davis provided a history of the alleged injury as provided by appellant. The three injured worker status reports diagnosed derangement of the knee. MRI report demonstrated degenerative changes of the medial compartment along with a possible tear. The findings were compatible with mild chondromalacia patella. The attending physician's report prepared by Dr. Davis diagnosed knee osteoarthritis with a possible meniscal tear. The report did not offer a causal relationship opinion but merely referred to Dr. Davis' initial report dated April 17, 1998.

By letter dated May 28, 1998, the Office asked Dr. Davis for a well-reasoned opinion on the causal relationship between appellant's right knee injury and his work activities. In a letter dated June 2, 1998, Dr. Davis responded by indicating he had not stated whether appellant's complaints were related to his work. Additional chart notes from Drs. Davis and Gerber were submitted, none of which contained an opinion on causal relationship.

On June 16, 1998 the Office issued a decision and denied appellant's claim for compensation under the Federal Employees' Compensation Act.<sup>1</sup> The Office found that the medical evidence was not sufficient to establish that the condition was caused by the employment factor as required by the Act.<sup>2</sup>

By letter dated June 30, 1998, appellant requested reconsideration of his claim and submitted an additional medical report. In a medical report dated June 24, 1998, Dr. Davis stated that appellant believed his knee problems were related to repetitive stress at work. He stated that he suspected that, over the years, kneeling and climbing could contribute to appellant's knee derangement. Additional medical records were also submitted documenting appellant's June 3, 1998 arthroscopic surgery and recovery.

By merit decision dated July 28, 1998, the Office denied appellant's request for review on the grounds that the evidence submitted was not sufficient to warrant modification of the prior decision.

In a letter dated November 10, 1998, appellant requested reconsideration. In support of his request, appellant submitted a medical report from Dr. Gerber. In the medical report dated November 6, 1998, Dr. Gerber indicated that appellant's condition was employment related. He stated that there was no other significant trauma of either an acute or chronic nature other than appellant's job duties of climbing bending and kneeling, which could account for appellant's current condition. Dr. Gerber concurred with Dr. Davis regarding causal relationship.

By nonmerit decision dated January 26, 1999, the Office denied appellant's request for review on the grounds that the evidence was not sufficient to warrant review of the prior decision. The Office found that Dr. Gerber's opinion was of no probative value as he relied on Dr. Davis' opinion, which the Office had found to be "deficient."

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Id.*

The Board finds that appellant has not met his burden of proof in establishing that he sustained a knee injury in the performance of duty.

An employee seeking benefits under the Act has the burden of establishing the essential elements of his or her claim including the fact that the individual is an “employee of the United States” within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that the injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>3</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>4</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by claimant. The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence, which includes a physician’s rationalized opinion on the issue of whether there is a causal relationship between the claimant’s diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>5</sup>

In the instant case, it is not disputed that appellant walked, kneeled and climbed as part of his job duties. However, he has not submitted medical evidence to support that a condition has been diagnosed in connection with the employment factor and that any alleged knee injury is causally related to the employment factors or conditions. On April 23, 1998 the Office advised appellant of the type of medical evidence needed to establish his claim. On May 28, 1998 the Office wrote to Dr. Davis directly requesting a well-reasoned opinion on the causal relationship between appellant’s right knee injury and his work activities. Dr. Davis responded in a letter dated June 2, 1998, stating “I have not stated that the patient’s complaints are or are not related to his work.” This is not an opinion on causal relationship and, therefore, is of no probative value.

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<sup>3</sup> *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>4</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>5</sup> *Id.*

In a medical report dated June 24, 1998, Dr. Davis indicated that he “suspects that over the years this kneeling, climbing *etc.* certainly would contribute to his knee internal derangement.”

His opinion is speculative and conjectural. The Board has held that speculative and equivocal medical opinions on causal relationship have no probative value.<sup>6</sup>

Reports received from Dr. Gerber prior to the July 28, 1998 decision did not contain the physician’s own opinion as to the cause of appellant’s condition.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant’s condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.<sup>7</sup> Causal relationships must be established by rationalized medical opinion evidence. Appellant failed to submit such evidence and the Office, therefore, properly denied appellant’s claim for compensation.

The Board further finds that the Office erred in refusing to reopen appellant’s case for a merit review under 5 U.S.C. § 8128(a).

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his claim by written request of the Office identifying the decision and specific issues(s) within the decision, which the claimant wishes the Office to reconsider and the reasons why the decision should change and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law;

“(ii) or Advancing a point of law or fact not previously considered by the Office;  
or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”<sup>8</sup>

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<sup>6</sup> See *Alberta S. Williamson*, 47 ECAB 569 (1996); *Frederick H. Coward, Jr.*, 41 ECAB 843 (1990); *Paul E. Davis*, 30 ECAB 461 (1979).

<sup>7</sup> See *Victor J. Woodhams*, *supra* note 4.

<sup>8</sup> 20 C.F.R. § 10.138(b)(1) (1998).

Section 10.138(b)(2) provides that any application for review of the merits of the claim, which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.<sup>9</sup> Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128 of the Federal Employees' Compensation Act.<sup>10</sup>

In support of his request for reconsideration, on November 10, 1998, appellant submitted a new medical report from Dr. Gerber dated November 6, 1998. He supported causal relationship, stating that he did not see any other significant trauma of either a chronic or acute nature other than that, which occurred on appellant's job, which consisted of climbing, bending and kneeling. The Board finds that this report constitutes relevant and pertinent evidence not previously considered by the Office. While Dr. Gerber submitted several earlier reports that were previously considered by the Office, his November 6, 1998 report was the first report in which he specifically supported that appellant's condition was caused or aggravated by employment factors. The Office found the report to be of no probative value because Dr. Gerber noted concurring with Dr. Davis' reports, which the Office previously found to be insufficient to meet appellant's burden of proof. However, the Board has held that the requirement for reopening a claim for a merit review does not include the requirement that a claimant must submit all evidence that may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of a reconsideration request only specifies that the evidence be relevant and pertinent and not previously considered by the Office.<sup>11</sup>

In view of the foregoing, the case shall be remanded to the Office to review the entire case record, including Dr. Gerber's November 6, 1998 report. After such further development as is deemed necessary, the Office shall issue an appropriate merit decision.

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<sup>9</sup> 20 C.F.R. § 10.138(b)(2) (1998). New Office regulations pertaining to reconsideration requests became effective on January 4, 1999; *see* 20 C.F.R. §§ 10.605-610 (1999). The Office's January 26, 1999 decision applied the previous regulations in effect prior to January 4, 1999; *see* 20 C.F.R. § 10.138 (1998). The Board notes that, while the regulations are numbered differently, the provisions contained therein are essentially identical insofar as they apply to the facts of the present appeal.

<sup>10</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>11</sup> *Kenneth R. Mroczkowski*, 40 ECAB 855, 858-59 (1988).

It is for the above reasons that the January 26, 1999 Office of Workers' Compensation Programs decision is set aside and the case is remanded for appropriate action consistent with this decision. The July 28 and June 16, 1998 decisions of the Office are affirmed.

Dated, Washington, D.C.  
August 2, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member